UNITED STATES

v.

R. R. HENSLER, SR., ET AL.

MAY 14 1964

A-29973 Decided

Mining Claims: Common Varieties of Minerals

Sand and gravel which meet road construction specifications without expensive processing and are especially well suited for road construction but which are used only for the same purposes as other widely available, but less desirable, deposits of sand and gravel are common varieties of sand and gravel and not locatable under the mining laws since these facts do not give them a special, distinct value.

Mining Claims: Contests--Mining Claims: Determination of Validity

Where a contest is brought against a mining claim on the ground of lack of discovery of a valuable mineral, the burden of proof is upon the contestee to show by a preponderance of the evidence that a discovery has been made after the Government has made a prima facie showing that there has not been a discovery.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-29973

: Contest No. 6906
: Riverside (formerly
: Los Angeles)

United States
v.
R. R. Hensler, Sr., et al.[1/]

: Placer mining claims
: declared void ab initio

: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

R. R. Hensler, Sr., and others[1/] have appealed to the Secretary of the Interior from a decision dated February 4, 1963, whereby the Assistant Director, Bureau of Land Management, affirmed a decision of a hearing examiner declaring their placer mining claims, Hensler 131821 NE, Hensler 131821 SE, Hensler 131821 NW, and Hensler 131821 SW, located in sec. 21, T. 13 S., R. 18 E., S.B.M., California, to be void ab initio.

The record shows that the four placer claims were located in March 1958 and recorded on the official county records of Imperial County, California, on May 23, 1958. The record also indicates that on March 31, 1958, appellant R. R. Hensler, Sr., filed an application in the Los Angeles land office to purchase material from the area covered by the claims and that on May 22, 1958, an agreement was entered into between Hensler and the Bureau of Land Management for the purchase of road fill material, estimated quantity of 40,000 cubic yards at .015 price per unit (1½ cent per yard), total purchase price $600. The expiration date of that agreement was June 15, 1959 (Tr. 39).

On October 3, 1960, a contest complaint was filed by the Government against the four claims. The complaint charged that the material found within the limits of the appellants' claims is not a

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1/ The other appellants are R. R. Hensler, Jr., V. L. Hensler, J. E. Hensler, J. D. Hensler, and Bonnie L. Hensler.

valuable mineral deposit under section 3 of the act of July 23, 1955, 69 Stat. 368, and that valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws. A hearing was held on March 21, 1961, at which the hearing examiner determined that the sand and gravel on the claims were particularly good deposits of commonplace materials, that they may possess an economic advantage to the holder but have no special use over and above the normal use of the general run of such materials, and that the land embraced within the limits of the claims was not open to location for the minerals claimed under the mining laws of the United States at the time the locations were made.

The appellants have protested from the outset of the contest action that it was impossible for them to receive an unprejudiced hearing on the validity of their claims because the question had been predetermined by the Department's decision in United States v. J. R. Henderson, 68 I.D. 26 (1961). In effect, they were admitting that under the Department's interpretation of the law their claims were invalid. Thus, although the appellants have directed their arguments primarily to charges of bias on the part of the hearing examiner and the incompetency of the Government's case against their claims, the substance of their allegations is a challenge to the Department's rulings with respect to what constitutes a locatable mineral.

A review of the record discloses no disputed issues of fact. The testimony of the witnesses indicated that the appellants removed from 160,000 to 170,000 tons of sand and gravel from the site of their claims. Most of the material removed was delivered under contract to the Division of Highways, State of California, for use in road construction. Evidence was submitted that the material met or exceeded specifications of the Division of Highways for base or surface course, that the material was unusually well suited for use in highway construction, and that, although other deposits of similar material do occur, the deposits under consideration are of a type and quality that is not common in Imperial County.

Section 3 of the act of July 23, 1955, supra, provided, at the time the appellants attempted to locate their claims,[2/] that:

2/ Amended by the act of September 28, 1962, 76 Stat. 652, 30 U.S.C. § 611 (Supp. IV, 1962), in details immaterial to this consideration.

"A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. 'Common varieties' as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *".

The pertinent regulation provides that:

"'Common varieties' includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be 'common varieties' if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. * * *" 43 CFR 3511.1(b), 29 F.R. 4584, formerly 43 CFR 185.121(b).

The sole issue involved in this case is whether or not the deposits in the appellants' claims possess some quality which removes them from the category of "common varieties" of sand and gravel.

In applying the statute, the Department has held that the fact that sand and gravel deposits may have characteristics superior to those of other sand and gravel deposits does not make them an uncommon variety of sand and gravel so long as they are used only for the same purposes as other deposits which are widely and readily available. United States v. J. R. Henderson, supra. Building stone suitable for construction purposes which is found in pleasing colors, which splits readily and can be polished satisfactorily, but can be used only for the same purposes as other available building stone is a common variety since its special characteristics do not give it a special value. United States v. Kelly Shannon et al., 70 I.D. 136 (1963). A large deposit of quartz suitable for ordinary construction purposes which contains

scattered small deposits of pink or rose quartz suitable for lapidary purposes is, nevertheless, a common variety of mineral. United States v. Frank Melluzzo et al., 70 I.D. 184 (1963).

Upon the evidence in the record, I concur with the findings of the Bureau of Land Management that the deposits in question have not been shown to possess characteristics which would remove them from the category of "common varieties" of sand and gravel. The evidence shows that the material in those deposits is a common substance that is used for a very common usage. The fact that it may be uncommonly well suited to that usage with little or no processing does not thereby change it into an uncommon mineral subject to location under the mining law.

The appellants' charge of bias has been carefully considered. Nothing in the record or in their arguments supports the validity of the charge.

Similarly, the allegation that the Government failed to meet the burden of proof in the contest is without merit. When the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F. 2d 836 (D.C. Cir. 1959); United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961). The Government's prima facie case was established upon the showing that the only minerals upon the claims were ordinary sand and gravel used for ordinary purposes. Thereafter, it was incumbent upon the claimants to show a discovery of other minerals known to have value in and of themselves or to show such unusual characteristics of the deposits claimed as to remove them from the classification of "common varieties". This burden was not met.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

Ernest F. Hom

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Assistant Solicitor
Land Appeals